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Issue Date: 21 July 2005

Case No. 2004-LHC-01921

OWCP No. 05-99273

In the Matter of

COLLIS A. WOODHOUSE,
Claimant
v.

NORFOLK SHIPBUILDING AND
DRYDOCK CORPORATION,
Employer

FARA SERVICES, INC.,
Carrier

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest

Appearances:
Matthew A. Kraft, Esq., for Claimant
Robert A. Rapaport, Esq., for Employer
Ronald Gurka, Esq., for Director

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim for both temporary and permanent disability compensation for an injury alleged to have been suffered by Claimant, Collis E. Woodhouse, in the course of employment covered by the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. § 901 *et seq*. Claimant seeks compensation due to a neck injury he suffered on August 5, 1996. Employer, Norshipco, agrees that Claimant is entitled to compensation but seeks partial relief from the special fund under §8(f) of the Act. The Director opposes such relief.

On December 16, 1997, Employer initially requested relief under §8(f) of the Act asserting that Claimant suffered from pre-existing degenerative disc disease, hypertension, hypercholesterolemia, hepatitis C and heroin addiction/methadone treatment. Employer also

alleged in its application that these pre-existing conditions were permanent in nature and contributed to Claimant's disability. A compensation order was issued by the District Director on July 2, 1999, based upon stipulations of facts between the Claimant and Employer, but no provision was made regarding §8(f) relief. On January 29, 2003, Employer filed a "supplemental" request for relief under §8(f), asserting that Claimant also suffered from hearing loss in addition to the other injuries and conditions previously alleged in Employer's initial §8(f) application on December 16, 1997. Employer also alleged in its application of January 29, 2003, that the additional pre-existing conditions were permanent in nature and contributed to Claimant's disability.

A formal hearing was scheduled in this matter for November 17, 2004, to consider modification of the Director's July 2, 1999 compensation order. By motion filed November 17, 2004, the Employer requested that the hearing be canceled, that Claimant and Employer be permitted to enter into stipulations concerning the issue of §22 modification, and permitting the Director and Employer to submit briefs only on the issue of 8(f). On January 7, 2005, an order issued in part directing the Director to submit its brief within 30 days after receiving Employer's brief. Employer's brief was received on February 10, 2005, and contained Exhibits 1 through 11 (EX 1-EX 11). Director's brief was received on March 16, 2005, and submitted no additional evidence.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

At the hearing, Claimant and Employer stipulated:

1. That on or about August 5, 1996, the claimant sustained injuries to the neck, scalp and right wrist when a piece of steel deck plate fell and struck him.

2. That on said date the claimant was performing services and engaged in work for Norfolk Shipbuilding & Dry dock Corporation and is covered by the Longshore & Harbor Workers Compensation Act.

3. That written notice of the injury was not given within thirty days but the employer had knowledge of the injury and had not been prejudiced by lack of such written notice.

4. That the employer furnished the employee with medical services in accordance with the provisions of Section 7 of the Act.

5. That the average weekly wage earnings of the claimant at the time of the injury were $856.28 and his compensation rate was $570.85.

6. That as a result of the injury the claimant was temporarily totally disabled from August 6, 1996, to September 29, 1996, inclusive, entitling him to compensation for a period of 7-6/7 weeks at $570.85 per week, amounting to $4,485.25; and again from October 4, 1996, through November 24, 1996, inclusive, entitling him to compensation for a period of 7-3/7 weeks at $570.85 per week, amounting to $4,240.60; and again from November 27, 1996, through February 23, 1997, inclusive, entitling him to compensation for a period of 12-5/7 weeks at $570.85 per week, amounting to $7,257.95; and again from April 16, 1997, through October 14, 1997, inclusive, entitling him to compensation for a period of 26 weeks at $570.85 per week, amounting to $14,842.10; and again from June 2, 2003, through July 6, 2003, inclusive, entitling him to compensation for a period of 5 weeks at $570.85 per week, amounting to $2,854.25.

7. That as a result of the injury the claimant was temporarily partially disabled on April 15, 1997, during which period his earning capacity was reduced to $385.56 per week, entitling him to compensation for a period of one-seventh (1/7) week at $313.81 per week, amounting to $44.83; and again from December 19, 1997, through June 1, 2003, during which the claimant's wage earning capacity was reduced to $189.87 per week, entitling him to compensation for a period of 284.571 weeks at a rate of $444.27 per week, amounting to $126,426.26; and again from July 7, 2003, through July 12, 2003, during which claimant's wage earning capacity was reduced to $113.11 per week, entitling him to compensation for a period of 1 week at the rate of $495.45 per week, amounting to $495.45[1]; and again from July 13, 2003, through July 26, 2003, during which claimant's wage earning capacity was reduced to $227.77 per week, entitling him to compensation for a period of 2 weeks at a rate of $419.01 per week, amounting to $838.02.

8. That as a result of the injury, the claimant was permanently partially disabled from July 27, 2003, to the present and continuing, during which

[1] By correspondence dated July 6, 2005, the parties submitted the following correction:

> In reviewing the Stipulation of Facts and Application for Award of Compensation I noticed two clerical errors which I would like to address with your Honor. In paragraph 7 of the Stipulations and paragraph 1 of the Decision and Award of Compensation a period of temporary total disability was identified as running from July 7, 2003 through July 12, 2003, a period of one week. This is, in fact, a period six (6) days. Therefore, it is requested that paragraph 7 at page 3 be amended to reflect six (6) days of compensation at the rate of $495.00 per week, amounting to $427.64 and the same correction being made in paragraph 1 of the Decision and Order on page 2. Further, in paragraph 2 of the Decision and Order it reflects that $193,570.94 had been paid through December 14, 2004. The correct figure is $195,730.94. It is respectfully requested that this change be made on paragraph 2 of the Decision and Order.
>
> I have already discussed these proposed changes with counsel for the claimant and he concurs.

claimant's wage earning capacity was reduced to $254.39 per week, entitling him to compensation at a rate of $401.26 per week.

9. That the employer has paid temporary total benefits in the amount of $30,825.90 and temporary partial disability benefits in the amount of $162,925.04 through and including December 14, 2004.

10. That the claimant has been paid five weeks permanent disability benefits for disfigurement under the Virginia Workers Compensation Act, amounting to $2,480.00, said payment noted for recorded purposes only and not to be credited against benefits due under the foregoing stipulations.

11. That permanent partial disability benefits shall continue to be paid to claimant at the rate of $401.26 per week based upon a wage earning capacity of $254.39 per week, until such time as circumstances warrant a change in claimant's compensation rate.

The stipulation of facts submitted by the Claimant and Employer are supported by substantial evidence in the record offered at the hearing. By letter dated April 15, 2005, counsel for Director informed me that the Director does not have a direct interest in the stipulations, and would thus not sign them. The Director explained that it does not take any position on these stipulations which relate only to issues between the Claimant and Employer. Therefore, as the Director has effectively waived any objection to these stipulations, they are accepted as sufficient to establish the Claimant's entitlement to benefits and a compensation order will be issued based thereon.

ISSUE

The sole remaining issue in dispute is whether the Employer is entitled to Special Fund relief under §8(f) of the Act.

DISCUSSION OF LAW AND FACTS

Medical Evidence

Hepatitis C/Liver Disorder

Claimant was diagnosed with positive hepatitis C antibody on May 9, 1995. (EX 1-2). He was treated by Dr. Caplan, who noted increased liver function studies over the previous year, and a positive hepatitis C antibody. (EX 1-2).

On June 15, 1995, Dr. Caplan stated that Claimant's "liver biopsy was reported to be normal and although I think there may be some very mild changes with some focal inflammation in the mid zone, we certainly did not see any obvious chronic active hepatitis." (EX 1-7). Dr.

Caplan also stated that "this may be an example of a recovery from Hepatitis C." (EX 1-5). Dr. Caplan opined that Claimant should be followed to be sure that his liver function studies return to normal and stay normal. (EX 1-7). Dr. Caplan also stated that "[i]t will be interesting to see what his hepatitis C antibody does long-term." (EX 1-7).

Claimant once again consulted Dr. Caplan on January 30, 1996, concerning his hepatitis C. Dr. Caplan noted that Claimant's "[l]iver biopsy is surprisingly unremarkable." (EX 1-5). Nonetheless, Dr. Lovell informed Claimant that "monitoring of his liver function is imperative." (EX 1-5).

Heroin Addiction/Methadone Treatment

Dr. Lovell in his April 5, 1995, report noted Claimant was a past drug user and was currently on methadone maintenance at the Norfolk clinic. (EX 1-1).

Dr. Riblet, Claimant's attending physican throughout his hospital stay following his accident, noted that shortly after admission to the hospital, Claimant had "increased agitation with significant drug-seeking behavior." Claimant informed that he was an outpatient for methadone treatment for heroin abuse." (EX 3). An office note dated August 14, 1996, noted that Claimant had some compliance problems and was "quite rowdy" while he was in the hospital following his work-related accident. (EX 1-9). The office note stated, "He is normally on a methadone program. We currently put him back on methadone and he is following with his methadone clinic." (EX 1-9).

Hearing Loss

On July 1, 1996, Claimant had an audiogram performed at Employer. He was diagnosed with binaural sensory neural hearing loss resulting in a 28.4% permanent partial disability loss. (EX 2-1).

Neck/Head/Shoulder medical notes

Dr. Riblet

Claimant was treated at Sentara Norfolk General Hospital Emergency Room on August 5, 1996. Dr. Riblet was Claimant's attending physician during his hospital stay following his accident. Claimant was admitted on August 5, 1996. Upon admission, Dr. Riblet's notes state:

> This is a 50-year-old black male status post blow to the forehead with a steel I-beam which fell approximately 10 feet, questionable loss of consciousness, never hemodynamically unstable. He arrived in the Trauma Bay with Glasgow Coma Score of 15, complaining of head and right arm and hand pain. He was a Bravo alert.

(EX 3-3). Dr. Riblet's plan of treatment for Claimant was as follows:

1. Repair hand and right arm lacerations
2. Cervical spine x-ray three views.
3. Upright chest x-ray.
4. Pelvis x-ray.
5. CT of head.
6. Tetanus booster.

(EX 3-4).

Claimant was later discharged on August 7, 1996, upon which Dr. Riblet noted that his x-rays and CT scan were negative. (EX 3-8).

Dr. Hassan

During his stay in the hospital, Claimant underwent a c-spine x-ray, which was administered on August 5, 1996 by Dr. Hassan. Dr. Hassan found "mild retrolisthesis of C4 over C5, this is most likely due to degenerative changes." (CX 1-8). He found "no evidence of fracture or dislocation." (EX 1-8). Dr. Hassan recommended flexion and extension views to "rule out possibility of subluxation." (EX 1-8).

Dr. Anne Brower: X-ray results

On August 6, 1996, Claimant underwent a testing on his cervical spine, which revealed the following:

> Flexion and extension views of the cervical spine show retrolisthesis of C4 on C5 and on the extension and the flexion view there is normal alignment. This subluxation is not indicative of acute trauma but rather due to degenerative changes.

(EX 1-10).

Dr. Sheldon Cohn

Dr. Cohn, an orthopedic surgeon, examined Claimant on October 4, 1996. (EX 401). Dr. Cohn described Claimant's history since his employment-related accident:

> On August 5, 1996, a rather large metal plate fell, striking the patient across the forehead and the right forearm. He had a closed head injury and was admitted to Sentara Norfolk General Hospital. His forearm laceration was repaired and, at this point, that is not giving him problems. He had a CT scan of his head and cervical spine films which revealed some retrolisthesis of C4 on C5 as well as degenerative changes. He was felt to have a cervical sprain and was discharged from the hospital. He has been in physical therapy and recently attempted to return to work. When

> he did so, he had increasing pain and spasm in his neck. The physical therapists have been somewhat stymied by his lack of progress.

(EX 4-1).

Dr. Cohn examined Claimant, and noted that the alignment of his cervical spine is normal. (EX 4-1). Dr. Cohn noted that Claimant cannot touch his chin to his chest, extend his neck past five degrees, and has difficulty rotating his chin to either shoulder. (EX 4-1). Dr. Cohn stated that Claimant had tense trapezius and deltoid muscles, and flexion/extension views of Claimant's spine revealed that the retrolisthesis does reduce. (EX 4-1). Dr. Cohn opined that this is likely due to degenerative changes, but recommended that Claimant consult Dr. Kirven, a spine specialist. (EX 4-1).

Dr. Felix Kirven

Dr. Kirven examined Claimant on October 7, 1996 and reviewed his radiographs. (EX 5). Dr. Kirven recounted Claimant's history:

> [Claimant] is a 51-year old man who works for the shipyard. He had a 700 pound beam him in the head as well as his right forearm on August 5, 1996. [Claimant] was hospitalized for a couple of days where he had stitches to his forehead and right arm. He was also treated for a neck sprain as well. [Claimant] now complains of neck stiffness and shoulder stiffness.

(EX 5-2).

Dr. Kirven noted that Claimant's original injury showed:

> An anterior compression fracture of the body of C3. As well, there is a subluxation of C4 on 5, in a retrolisthesis manner of 2 mms.

(EX 5-3). Dr. Kirven diagnosed a C3 anterior compression fracture which he felt was "acute" as well as degenerative retrolisthesis of L4 on 5. (EX 5-3). He recommended physical therapy and kept Claimant out of work for three weeks. (EX 5-3).

Claimant returned to Dr. Kirven on October 28, 1996 with continuing neck stiffness. Claimant had a restricted range of motion only to 45 degrees. Dr. Kirven kept Claimant out of work for an additional three weeks to continue physical therapy. Dr. Kirven suggested that Claimant return to work in three weeks at light duty. (EX 5-4).

Dr. Mark B. Kerner

Claimant has been a patient of Dr. Kerner, a specialist in spine surgery, since December 17, 1996. Claimant initially consulted Dr. Kerner for a second opinion, "complaining of pain in his head, neck and upper arm due to an injury on August 5, 1996 when a beam hit him in the

head at work." (EX 6, 7). Dr. Kerner observed that Claimant's x-rays taken following his work related accident had shown "mild compression fracture at the anterior lip of C3 and subluxation of C4 and C5." (EX 7).

At his first examination, Dr. Kerner noted that Claimant's primary complaint was "significant pain in his neck that goes into his left shoulder." (EX 7). Claimant had rated his pain as 7-8 out of 10 during this visit. (EX 6-1). Dr. Kerner reviewed Claimant's AP and lateral radiographs of his cervical spine, and determined:

> [Claimant] has an apparently minimal chip fracture off the anterior lip of C3. He has quite significant listhesis at C4-5. In full flexion it reduces, in extension, it is at its worse. Examination showed some hyperreflexia and possibly clonus, along with triceps weakness. I also ordered an MRI of the cervical spine which demonstrated a disc protrusion at C4-5 at the level of his spondylolisthesis.

(EX 7).

Because Claimant's MRI revealed questionable findings, Dr. Kerner ordered a myelogram. Dr. Kerner's office notes dated January 21, 1997 reveal that Claimant was unable to get the CT Myelogram because he was unable to tolerate the procedure done by the physician at that time. (EX 6-5). Dr. Kerner noted:

> We will schedule him to have the CT myelogram done by another radiologist. [Claimant] continues to have clonus on the right and hyperrelexia bilaterally. He is having neck pain, left sided pain. I believe that could be due to disc protrusion and listhesis as noted. However, without proof by myelogram, I do not think I can state this with enough certainty to allow surgical exploration.

(EX 6-5).

Claimant was finally able to complete the myelogram, which was reviewed on February 11, 1997. (EX 6-4). Dr. Kerner stated that it showed a "small spondylolysis at C4-5." (EX 6-6). Claimant also complained of headaches, which Dr. Kerner stated were post-traumatic headaches and referred Claimant for a neurological exam. (EX 6-6). Dr. Kerner opined that Claimant had reached Maximum Medical Improvement. (EX 6-6). Dr. Kerner made an addendum to this finding on February 28, 1997:

> It is an error for me to state that [Claimant] is at maximum medical improvement at this time. That decision needs to be deferred until he has been back at work for a reasonable period of time.

(EX 6-7).

Dr. Kerner noted that Claimant continued to complain of enduring headaches and upper scapular pain on April 23, 1997. (EX 7). Claimant was referred by Dr. Kerner to Dr. Wilks, a neurologist and headache specialist. (EX 6-8). Dr. Wilks noted that Claimant had been released for light duty work. She opined that it is common to have headaches following a post-flexion/extension injury. (EX 6-10).

Dr. Wilks recommended Claimant undergo a functional capacity evaluation. Dr. Kerner opined on July 22, 1997, that the functional capacity evaluation revealed Claimant could return to work, despite complaining of dizziness and instability. (EX 6-11, 7). Dr. Kerner determined that Claimant could return to work at a light to light medium level, explaining:

> I assigned permanent restrictions of occasionally lifting 20 pounds, frequently lifting 15 pounds, and constantly lifting 5-10 pounds. He should have no crawling or ladder climbing. It is my opinion that [Claimant's] restrictions are permanent. I determined that he reached maximum medical improvement on July 22, 1997.

(EX 7-2). Dr. Kerner also noted on July 22, 1997:

> At this point, I believe [Claimant] is at maximum medical improvement. I think he has a permanent partial disability, secondary to his injury. I believe he needs to return to restrictions as indicated by his Functional Capacity Evaluation. I believe these restrictions should be permanent. I do not see any need for any further medical intervention at this time. The restrictions I have indicated for him include that he can occasionally lift 20 lbs., frequently lift 15 lbs., and constantly lift 5-10 lbs. He should have no crawling or ladder climbing. Further restrictions could be determined from his complete Functional Capacity Evaluation which is part of his medical record. I will see him again as needed.

(EX 6-11). On December 30, 1997, Claimant informed Dr. Kerner that he had returned to work "doing some type of stock work with some overhead activity." (EX 6-19). Claimant informed Dr. Kerner that this work gives rise to neck and arm pain by the end of the day. (EX 6-19).

On February 24, 1998, Claimant informed Dr. Kerner that he was able to tolerate his light duty employment in a warehouse. Dr. Kerner reiterated that Claimant had reached maximum medical improvement and that Claimant's restrictions would now become permanent. (EX 6).

Dr. Kerner noted that Claimant continued to demonstrate episodic tingling in his neck and arm. (EX 7-2). Claimant consulted Dr. Kerner on July 6, 1999, and on April 3, 2000, complaining of neck pain each visit. (EX 7-2). Claimant was examined by Dr. Anuradha Datyner, a spine physican in Dr. Kerner's office, at Dr. Kerner's request. Claimant was working within his restrictions, and complained of minimal pain. Dr. Datyner recommended that Claimant return on an as-needed basis. (EX 6-24).

In a letter dated January 21, 2003, Dr. Kerner determined that Claimant's preexisting degenerative disk condition, combined with his current August 5, 1996 neck injury, caused greater disability than the neck injury alone. Specifically, Dr. Kerner opined:

> Based on my examinations, review of x-rays, MRI and review of the medical records, I diagnosed that [Claimant] had spondylolisthesis at C4-5 which was degenerative.
>
> It is my opinion that [Claimant] suffered from a pre-existing permanent condition in his neck before his August 5, 1996 neck injury at work. This is evidenced by his August 5, 1996 x-ray showing degenerative disk changes at C4. The degenerative changes were present for a significant period before his August 5, 1996 injury. This condition pre-existed his August 5, 1996 neck injury. His pre-existing degenerative condition made him more susceptible to the effects of the cervical injury in August 1996. [Claimant's] current permanent condition for his neck is due to a combination of his pre-existing permanent degenerative changes and his August 5, 1996 neck injury. It is my opinion that his current cervical condition is materially and substantially greater due to the combination of his pre-existing permanent degenerative disc disease and his August 5, 1996 neck injury. In fact, 30% of his current neck condition is due to his pre-existing permanent degenerative changes to his neck at C4. [Claimant's] current condition is greater because of the combination of his pre-existing degenerative condition and his August 5, 1996 injury than with his 1996 neck injury alone.

(EX 7-2).

Section 8(f) relief

Section 8(f) was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. *See C& P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). Without such protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have. *See Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 839 (9th Cir. 1982). *See also* H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; A. Larson, *Workers' Compensation Law* § 59.00 (1992). In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed. *See Director v. Todd Shipyard Corp.*, 625 F.2d 317 (9th Cir. 1980).

Under §8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

(1) The injured worker had an existing permanent partial disability before the most recent injury;
(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and
(3) Depending on whether the present disability is total or partial,
    (a) if the present permanent disability is total, it is not due solely to the most recent injury; or
    (b) if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the preexisting permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 25 BRBS 85, 87 (CRT) (9th Cir. 1991).

Employer alleges that it meets all the necessary requirements, and is thus entitled to §8(f) relief. Employer asserts that Claimant had preexisting permanent hearing loss, hypertension, hepatitis C and liver condition, heroin addiction and degenerative disc disease. Employer further purports that all were manifest to Employer and contribute to Claimant's current permanent disability.

Preexisting Permanent Partial Disability

The first question to address is whether Claimant had a preexisting permanent partial disability prior to the subject injury. In this regard, it is not necessary for the preexisting disability to have caused an economic loss. *See Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *C & P Telephone v. Director OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Rather, this first requirement is satisfied if it is shown that:

> [T]he employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

Lockheed Shipbuilding, 25 BRBS at 87 (CRT) (*citing C & P Telephone Co.*, 564. F.2d at 513).

Employer has asserted in its 8(f) application that Claimant had pre-existing conditions of hearing loss, hypertension, hypercholesterolemia, hepatitis C, liver condition, heroin addiction/methadone treatment, and degenerative disk disease prior to the occurrence of his neck injury on August 5, 1996.[2] Employer alleges that these conditions were permanent and partial on the date of his work-related injury.

[2] Employer also makes mention that Claimant had previously suffered a perforated ulcer. However, the only reference to this was in a medical history taken by Dr. Lovell on April 6, 1995, which merely notes that Claimant required surgical repair of his perforated ulcer in 1970. (EX 1). As there is no evidence that this ailment is a permanent disability, it will not be considered in this application for 8(f) relief.

Hearing Loss

Employer alleges that Claimant suffers from preexisting, permanent partial hearing loss sustained while working at Employer. For an employer to be entitled to §8(f) relief in hearing loss cases, a fourth element must be met. In such cases, "the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of Section 702.441.[3]" 20 C.F.R. § 702.321(a)(1).

However, Employer's evidence of Claimant's hearing loss fails to meet the established requirements necessary to invoke §8(f) relief. There is no evidence offered in the record that Claimant's audiogram was administered and interpreted by an appropriately certified physician, or a licensed professional audiologist or technician, pursuant to the approved standards, or whether the machine had been properly calibrated. Employer also fails to acknowledge whether a copy of the audiogram and the report were given to Claimant within thirty days of the test. Thus, because Employer failed to meet the regulatory standards, its claim for 8(f) relief based on Claimant's alleged pre-existing hearing loss must be rejected.

Hepatitis C and Liver Condition

The Director argues that the claim for hepatitis C and liver condition may not be considered because it is not permanent. Claimant was diagnosed with positive hepatitis C antibody on May 9, 1995. (EX 1-2). In support of its argument, the Director highlights Dr. Caplan's statements of June 15, 1995, which relayed that Claimant's "liver biopsy was reported to be normal and although I think there may be some very mild changes with some focal inflammation in the mid zone, we certainly did not see any obvious chronic active hepatitis," thereby prompting Dr. Caplan to conclude that "this may be an example of a recovery from Hepatitis C." (EX 1-5).

However, as Employer highlights in support of permanency, Dr. Caplan's opinion dated January 30, 1996, noted that although Claimant's "[l]iver biopsy is surprisingly unremarkable,"

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[3] The Code of Federal Regulations, 20 C.F.R. Section 702.441Claims for hearing loss, provides in part:

(a) Claims for hearing loss pending on or filed after September 28, 1984 (the date of enactment of Pub. L. 98-426) shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations.

(b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:

(1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

(2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.

Claimant must remain under his care as "monitoring of his liver function is imperative." (EX 1-5). Dr. Caplan again evaluated Claimant on June 11, 1996, at which time he noted that Claimant's "liver biopsy was surprisingly unremarkable." (EX 1-5). In its brief drafted in 2005, Employer argues that "Claimant continues to be treated for his preexisting permanent hepatitis C condition. He continues to require liver function tests to monitor his condition." (Employer's Brief at 3).

Notably, however, the last of such tests evidenced in the record was administered on April 11, 1996. This fact, combined with the lack of "obvious chronic active hepatitis," and Dr. Caplan's opinion of a possible recovery, undermine a finding that Claimant's hepatitis is "permanent" for the purpose of considering §8(f). (EX 1). The fact of past injury is a necessary but not sufficient prerequisite for §8(f) eligibility, rather "[t]here must exist, as a result of [the prior] injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46 (9th Cir. 1991); *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222 (D.C. Cir. 1985). The mere fact that an employee suffered from an earlier ailment, or even several serious previous ailments, or a chronic ailment does not by itself establish that he or she had a pre-existing permanent partial disability for purposes of section 8(f). Section 8(f) requires a pre-existing *disability*, not merely a pre-existing illness or injury. In addition, the pre-existing disability must be permanent, not just temporary. *Director, OWCP v. Campbell Industries*, 678 F.2d 836, 840 (9th Cir. 1982).

The record contains no evidence indicating that claimant's Hepatitis C or liver condition has resulted in any serious, lasting physical problem, as is a pre-requisite to establishing a pre-existing permanent partial disability under §8(f). Further, the record does not support a conclusion that Claimant had a serious, lasting physical condition involving his liver which predisposed him to a higher risk of further injury such that a cautious employer would have been motivated to discharge him because of the greatly increased risk of compensation liability. Claimant appears to suffer from few ill effects stemming from his Hepatitis C and liver condition. Because there does not appear to be a serious lasting physical problem related to hepatitis C or liver condition, it can not be classified as an existing permanent partial disability for the purposes of §8(f).

Heroin Addiction

The Director also argues that Claimant's heroin addiction and subsequent methadone treatment cannot be classified as a permanent pre-existing condition under §8(f) because it is an "unhealthy habit," rather than a medically cognizable physical ailment. The Director highlights that this issue has been addressed by the Benefits Review Board, which observed that to qualify as such, "A pre-existing disability must be a medically cognizable physical ailment rather than an unhealthy habit or lifestyle." *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989).

I disagree with the Director's classification of Claimant's drug abuse as a mere unhealthy habit as Claimant's history of drug addiction necessitates methadone treatment. Concededly, the phrase "existing permanent partial disability" of §8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. *Sacchetti v. General Dynamics Corp.,* 14 BRBS 29 , 35 (1981); *aff'd*,

681 F.2d 37 (1st Cir. 1982). Rather, there must be some pre-existing physical or mental impairment typified as a defect in the human frame, such as alcoholism, diabetes, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. *Director, OWCP v. Pepco,* 607 F.2d 1378 (D.C. Cir. 1979), *aff'g,* 6 BRBS 527 (1977); *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP,* 542 F.2d 602 (3rd Cir. 1976); *Parent v. Duluth Missabe & Iron Range Railway Co.,* 7 BRBS 41 (1977). By way of explanation, the First Circuit Court of Appeals stated, "[S]moking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee." *Sacchetti,* 681 F.2d at 37. Accordingly, physically disabling symptoms attributable to drug abuse may thus be sufficient to establish a pre-existing permanent partial disability. Claimant's frame was obviously impaired by his heroin addiction. Otherwise, he would not have required medical intervention in the form of methadone treatment to cope with this ailment and its accompanying physical effects. As such, I find that Claimant's heroin addiction qualifies as a permanent[4] pre-existing condition and may be entitled to 8(f) relief if the other elements are met.

Hypertension, Hypercholesterolemia, and Degenerative Disc Disease

The Director seemingly concedes that Claimant's hypertension, hypercholesterolemia, and degenerative disc disease qualify as permanent pre-existing conditions for purposes of considering §8(f) relief (Director's brief at 7). Additionally, Claimant's medical records indicate that he suffered from these ailments prior to his employment-related accident. Therefore, the requirement of a pre-existing permanent partial disability for the purposes of §8(f) relief has been met in this case, with respect to these conditions.

Manifestation

The second requirement for §8(f) relief will be met if the employer had actual or constructive knowledge of the worker's preexisting disability prior to the subject injury. Constructive knowledge will be established by medical records shown to be in existence at the time of the subject injury from which the preexisting condition was objectively determinable. *Director, OWCP v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 457, 8 BRBS 498, 504 (3d Cir. 1978).

The Director argues that Claimant's alleged pre-existing disabilities do not meet the manifest requirement for the simple reason that they were not manifest prior to the occurrence of Claimant's work injury of August 5, 1996. Employer responds that medical records were in existence regarding Claimant's degenerative disc disease, hypertension, hypercholesterolemia, and heroin addiction and methadone treatment.

The record includes evidence that Claimant's hypertension, heroin addiction and methadone treatment were manifest to Employer prior to Claimant's work related injury. Claimant's medical records beginning on April 6, 1995 clearly make mention of these ailments. (EX 1). Thus, I find that these records are sufficient to impose constructive knowledge of

[4] Claimant's past history of significant heroin abuse and continuous need for methadone treatment renders it sufficient to be classified as permanent.

Claimant's hypertension[5] and heroin addition and methadone treatment upon Employer.

However, I find that Claimant's other ailments, namely his degenerative disc disease, and hypercholesterolemia were not manifest to Employer prior to Claimant's employment-related accident. A diagnosis of a pre-existing condition which is made *after* the work injury occurred is not sufficient to satisfy the manifestation requirement, even if that diagnosis is supported by pre-existing medical records. *Caudel v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Sealand Terminals v. Gasparic*, 7 F.3d 321 (2nd Cir. 1993). The first mention in the record of hypercholesterolemia appears in medical records developed after Claimant was admitted to the hospital for his work related injuries on August 5, 1996. Dr. Riblet had noted that Claimant's past medical history was significant for hypercholesterolemia. (EX 3-3). However, the record is absent of medical records drafted prior to Claimant's accident diagnosing him with this ailment, from which constructive knowledge may be imputed. As such, I find that Claimant's hypercholesterolemia was not manifest to Employer.

Employer argues that Claimant's degenerative disc condition was manifest to Employer as it was noted by Dr. Hassan on August 5, 1996. Additionally, on December 17, 1996, Dr. Kerner specifically stated that it was a longstanding preexisting permanent condition. On January 21, 2003, Dr. Kerner wrote that the "degenerative conditions were present for a significant period before his 8/5/96 injury." (EX 7). Again, the timing of this diagnosis renders it insufficient to meet the manifest requirement. A diagnosis of a pre-existing condition which is made after the work injury occurred – even if that diagnosis is supported by pre-existing medical records – is not sufficient for purposes of manifestation. *Sealand Terminals*, 7 F.3d at 323. Therefore, Claimant's degenerative disc condition was not manifest to Employer prior to his employment injury.

Contribution

Notwithstanding the above findings, had Employer sufficiently established the other requirements necessary in a §8(f) application, Employer would also have the burden to establish that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. Employer fails to satisfy the contribution element under all of the alleged preexisting disabilities. The Fourth Circuit

[5] Citing to *Transby Container Terminal v. U.S. Department of Labor*, 141 F.3d 907 (9th Cir. 1998), the Director argues that Claimant's hypertension was not manifest. The employer in *Transby* argued that the ALJ's finding that the condition was not manifest was not supported by substantial evidence because several "risk factors" for cardiovascular disease and myocardial infarction were discoverable from the claimant's medical records. The employer pointed to four recorded incidents of high blood pressure over a period of 6 years, a 20 year history of smoking two packs of cigarettes daily, a family history of diabetes mellitus, and that the claimant was an obese male. The Ninth Circuit held in *Transby* that mere presence of certain "risk factors" is not legally sufficient. Without a documented diagnosis, there must be "sufficient unambiguous, objective, and obvious indication of a disability ... reflected by the factual information contained in the available records so that the disability should be considered manifest even though actually unknown by the employer." *Transby*, 141 F.3d at 911. Unlike *Transby*, Claimant's medical records dated April 6, 1995 and continuing, specifically mention a history of hypertension and thus presents an obvious indication of a disability and is thereby sufficient to meet the manifest requirement. (EX 1).

explained the contribution element in *Newport News Shipbuilding & Dry Dock v. Director, OWCP (Harcum I)*, 8 F.3d 175 (4th Cir 1993):

> To satisfy this additional prong of the contribution element, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Id. at 185-6.

Employer must quantify the type and extent of disability the employee would have suffered in the absence of the previous injury, so that the "adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater." *Id.* In assessing whether the contribution element has been met, an ALJ may not "merely credulously accept the assertion of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Carmines*, 138 F.3d at 140. Recent cases in the Fourth Circuit have stressed that doctors' opinions which attempt to quantify the hypothetical injury will not be sufficient if "they are conclusory and lack[ing] in evidentiary support." *Newport News Shipbuilding & Dry Dock Company v. Ward*, 326 F.3d 434, 442 (4th Cir. 2003); *see also Newport News Shipbuilding & Dry Dock Company v. Cherry*, 326 F.3d 449, 453 (4th Cir. 2003) (rejecting similar evidence as "pure conjecture.")

To establish entitlement to 8(f) relief, it is not enough for employer to show that a preexisting condition led to serious disability, if the work-related injury would itself have led to the same or greater disability. *Carmines*, 138 F.3d at 139. Section 8(f) relief is available only if the ultimate disability is substantially greater than that which would have arisen absent preexisting disability. *Id.* Additionally, it is not sufficient to simply calculate the current disability and subtract the percentage of disability that resulted from the pre-existing disability. *Id.* at 143.

Employer argues that Claimant's current disability is the result of his preexisting permanent partial degenerative disc disease combined with his August 5, 1996 neck injury. In support, Claimant cites Dr. Kerner's January 21, 2003 opinion that Claimant's current permanent condition is not due solely to his August 5, 1996 work injury. Specifically, Dr. Kerner stated:

> It is my opinion that [Claimant] suffered from a pre-existing permanent condition in his neck before his August 5, 1996 neck injury at work. This is evidenced by his August 5, 1996 x-ray showing degenerative disk changes at C4. The degenerative changes were present for a significant period before his August 5, 1996 injury. This condition pre-existed his August 5, 1996 neck injury. His pre-existing degenerative condition made him more susceptible to the effects of the cervical injury in August 1996. [Claimant's] current permanent condition for his neck is due to a combination of his pre-existing permanent degenerative changes and his August 5, 1996 neck injury. It is my opinion that his current cervical condition is materially and substantially greater due to the combination of his pre-existing permanent degenerative disc disease and his August 5, 1996 neck injury. In fact, 30% of his current neck condition is due to his pre-existing permanent degenerative changes to his neck at C4. [Claimant's] current condition is greater because of the combination of his pre-existing degenerative condition and his August 5, 1996 injury than with his 1996 neck injury alone.

(EX 7-2).

However, this conclusion fails to satisfy the contribution requirement for §8(f) relief. Dr. Kerner assigns a thirty percent rating to Claimant's *pre-existing* changes in his neck. As is required by the Fourth Circuit, Dr. Kerner fails to quantify the amount of Claimant's impairment attributable to his cervical work injury. Accordingly, based on the evidence in the record, Employer has failed to properly quantify the extent of Claimant's impairment resulting from his work-related neck injury alone, absent his pre-existing degenerative disc disease.

As to the alleged pre-existing permanent hearing loss, hypertension, hepatitis C and liver condition, and heroin addiction, Employer has failed to submit any evidence that even attempts to quantify any impairment resulting from such conditions. I am therefore unable to evaluate whether Claimant's ultimate disability materially and substantially exceeded the disability that would have resulted from Claimant's most recent injury. The contribution element has thus not been established. This finding, along with Employer's failure under the other elements discussed *supra*, render Employer ineligible for §8(f) relief for Claimant's permanent partial disability.[6]

ORDER

Accordingly, it is hereby ordered that:

[6] In its brief, the Director also offers analysis of the contribution element under permanent total disability. However, such discussion is unnecessary, as the only permanent disability for which Claimant is entitled to compensation is partial. (JX 1).

1. Employer, Norfolk Shipbuilding and Drydock Corporation, is hereby ordered to pay compensation to Claimant, Collis E. Woodhouse, as follows:

   For temporary total disability from August 6, 1996, to September 29, 1996, from October 4, 1996, to November 24, 1996, from November 27, 1996, to February 23, 1997, April 16, 1997, to October 14, 1997, and from June 2, 2003, to July 6, 2003, inclusive, 59 weeks at $570.85 per week, a total of $33,680.15;

   For temporary partial disability on April 15, 1997, 1/7 weeks at $313.81 per week, a total of $44.83; from December 18, 1997 through June 1, 2003, 285—4/7 weeks at $444.27 per week, a total of $126,426.36; from July 7, 2003 through July 12, 2003, 6 days at $495.45 per week, a total of $427.64; and from July 13, 2003 through July 26, 2003, 2 weeks at $419.01 per week, a total of $838.02; and

   For permanent partial disability from July 27, 2003 to the present and continuing at a rate of $401.26 per week until such time as circumstances warrant a change in claimant's compensation rate.

2. The employer having paid $195,750.94 through and including December 14, 2004, to the claimant in temporary total and temporary partial compensation shall receive a credit for all payments made.

3. The employer shall continue to provide medical services to the claimant in accordance with the provisions of §7(a) of the Act.

4. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

5. Employer's application for relief under § 8(f) of the Act is DENIED.

6. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON
Administrative Law Judge